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HAROLD B. WILLEY, Clerk

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1954

No. 509

MARY A. MARSMAN,
*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals for the Fourth Circuit.

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No.

MARY A. MARSMAN,
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vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals for the Fourth Circuit.

*To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Your petitioner, MARY A. MARSMAN, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fourth Circuit entered

on October 8, 1954, which affirmed a judgment of The Tax Court of the United States, finding a deficiency of $82,-248.82 in your petitioner's taxes for 1941.

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## OPINIONS BELOW.

The memorandum *sur* decision rendered by the Tax Court is unreported but is printed in the appendix to this petition.

The *per curiam* opinion of the Court of Appeals appears in *Marsman v. Commissioner,* 216 F. 2d 77 (4th Cir. 1954), and a copy of this opinion has been printed in the appendix to this petition.

Earlier opinions on questions not here presented for review are:

Tax Court Memorandum Decision,
*J. H. Marsman,* P-H 1950, T.C. Mem. Dec. Par. 50,038 (1950);
*Mary A. Marsman,* 18 T.C. 1 (1952);
*Marsman v. Commissioner,* 205 F.2d 335 (4th Cir. 1953).

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## JURISDICTION.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 United States Code, section 1254(1) (1948).

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 8, 1954, and is printed in the appendix to this petition.

## QUESTION PRESENTED FOR REVIEW.

The question presented by this petition is whether upon remand from a court of appeals the Tax Court may increase the amount of a judgment originally entered against an appellant taxpayer even though the respondent Commissioner of Internal Revenue did not appeal from the judgment originally entered.

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## STATUTES INVOLVED.

28 United States Code, section 2106 (1948), provides:

> *"Determination*
>
> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Internal Revenue Code, section 1141(a) (1939) as amended, 62 Stat. 991 (1948) (now 26 U.S.C. sec. 7482(a)) provides:

> "The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code."

## STATEMENT OF THE FACTS.

This case originally involved income tax deficiencies of $352,264.65 (including penalty) for 1939; $142,298.90 for 1940, and $152,224.16 for 1941 (R. 11, 13). Two hearings were held by the Tax Court, pursuant to stipulation separating the trial of the issues, and opinions were rendered which are reported, respectively, in *J. H. Marsman,* P-H 1950, T.C. Mem. Dec. Par. 50,038 (1950), and in *Mary A. Marsman,* 18 T.C. 1 (1952). Upon the first hearing, the Tax Court decided that petitioner was a nonresident alien at all times prior to September 22, 1940, but that from that date forward she was subject to tax as a resident alien. Upon the second hearing two issues pertinent to this petition were presented and disposed of as follows:

1. Whether there should be included in petitioner's taxable income her community share of the undistributed net incomes of two foreign personal holding companies (her own and her husband's) earned by such companies during the entire calendar year 1940, or whether there should be included only her community share of that portion of such corporations' incomes as was earned after September 22, 1940, the date on which she became a resident of the United States. The Tax Court decided this issue in favor of respondent and held petitioner taxable on her community share of the corporations' incomes earned by them during the entire calendar year 1940.[1]

[1]The incomes of these corporations were determined to be community income in accordance with the Tax Court's decision on another issue not here relevant.

2. Whether petitioner, reporting on the cash basis, was entitled to a foreign tax credit against her 1941 United States income tax for Philippine income taxes actually paid in 1941 but which taxes were attributable to the years 1939 and 1940; in the alternative, petitioner claimed such taxes as a deduction from her 1941 income. The Tax Court decided that these taxes for the year 1939 and for that portion of the year 1940 prior to petitioner's becoming a resident were not available either as a credit or as a deduction because during these periods petitioner's income was not subject to double taxation by the Philippines and the United States. The Tax Court did allow as a credit that portion of the 1940 Philippine taxes which was allocable to the period after petitioner became a resident of the United States because during this later period her income was subject to double taxation by the Philppines and the United States. Having held on the first issue that petitioner was taxable on her community share of the foreign personal holding corporations' incomes earned during the entire calendar year 1940, the Tax Court also allowed as a credit Philippine taxes paid in 1941 on the entire 1940 incomes of these corporations.

Before the second hearing in the Tax Court, the parties adopted the customary practice before the Tax Court of entering into a stipulation which stated in part (R. 34):

> "There are two issues for the year 1941 on which petitioner and respondent disagree: * * * (b) foreign tax credit or deduction. Computation of tax will be

made under Rule 50 in accordance with this Court's decision on these issues."[2]

Pursuant to the foregoing holdings, and upon consideration of the Commissioner's computation under Rule 50 of the Tax Court, it was decided by the Tax Court on

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[2]Rule 50 of the Tax Court provides:

"Where the Court has promulgated or entered its opinion determining the issues in a proceeding, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to the report of the Court, they or either of them shall file promptly with the Court an original and two copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision. If, however, the parties are not in agreement as to the amount of the deficiency or overpayment to be entered as the decision, in accordance with the report of the Court, either of them may file with the Court a computation of the deficiency or overpayment believed by him to be in accordance with the report of the Court. The Clerk will serve a copy thereof upon the opposite party, will place the matter upon a motion calendar for argument in due course, and will serve notice of the argument upon both parties. If the opposite party fails to file objection, accompanied by an alternative computation, at least five days prior to the date of such argument, or any continuance thereof, the Court may enter decision in accordance with the computation already submitted. If in accordance with this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the Court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court will determine the correct deficiency or overpayment and enter its decision.

Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for rehearing or reconsideration."

June 13, 1952, that there were deficiencies in petitioner's income tax for the calendar year 1939 in the amount of $133.25; for the taxable period September 22 to December 31, 1940, in the amount of $58,855.63; and for the calendar year 1941 in the amount of $61,780.35 (R. 62-63). No bond having been filed (I.R.C., sec. 1145), the deficiencies were assessed by the respondent, and they were paid, with interest, on or about January 2, 1953.

No petition for review was filed by the respondent Commissioner. Petitioner filed a petition for review but only of so much of the Tax Court's decision as determined deficiencies, as above stated, for the taxable period September 22 to December 31, 1940, and for the calendar year 1941 (R. 63-67). The petitioner raised before the Court of Appeals the issues of (1) whether she was a resident alien for the period from September 22, 1940, through December 31, 1941; (2) whether, even if she was such, the undistributed incomes of the two foreign personal holding corporations earned during the period prior to September 22, 1940, should be included in her income for 1940; and (3) whether a foreign tax credit or deduction should be denied for 1941 with respect to Philippine income taxes for 1939 and 1940, paid in 1941, to the extent that such Philippine taxes are attributable to income on which the Tax Court had held the petitioner not subject to United States income taxes for 1939 and 1940.

The Court of Appeals decided the first and third issues for the respondent, affirming the Tax Court in those respects, but it reversed the Tax Court on the second issue and decided it for the petitioner. *Marsman v. Commis-*

*sioner of Internal Revenue,* 205 F. 2d 335 (4th Cir. 1953). It remanded the case to the Tax Court "for further proceedings in accordance with the opinion of the Court filed herein" (Mandate, R. 68-69).

Upon remand, the respondent Commissioner submitted to the Tax Court a proposed computation for entry of decision which included an additional deficiency for 1941 (R. 70-76). The additional deficiency for 1941 resulted from a denial of $20,468.47 of the credit for Philippine income taxes for 1940. The respondent had previously included this sum as a credit in his computation of tax under Rule 50, and this computation had previously been adopted by the Tax Court in rendering its earlier judgment. The reduction of the credit resulted collaterally from the decision of the Court of Appeals reducing the amount of the 1940 incomes of the two foreign personal holding corporations which was subject to United States income tax. The merits of such adjustment to petitioner's foreign tax credit if the Commissioner had also appealed from the 1941 judgment are not here in dispute.

Petitioner, at the hearing before the Tax Court, objected to respondent's computation on the ground that, there having been no appeal by respondent, the Tax Court had no power to increase the deficiency for 1941 beyond that which it had previously adjudged. The Tax Court, however, rejected petitioner's contention and entered its decision that there was a deficiency of $12,203.50 for the period September 22, 1940, to December 31, 1940, which had been paid pending appeal, and a deficiency of $8[illegible]48.82 for 1941, of which $61,780.35 had been paid pending appeal (R. 77-78). (Although differently ex-

pressed, that decision conformed to respondent's computation.) On appeal by your petitioner the Court of Appeals affirmed the Tax Court in a *per curiam* decision, a copy of which has been printed in the appendix to this petition.

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**BASIS FOR FEDERAL JURISDICTION IN THE TAX COURT AND THE COURT OF APPEALS.**

This action was commenced by filing a petition for redetermination of deficiencies for the years 1939, 1940 and 1941 (R. 6, et seq.). Jurisdiction of the Tax Court in this action was based on section 272 of the Internal Revenue Code (1939); jurisdiction of the Court of Appeals to review the judgment of the Tax Court was based on section 1141(a) of the Internal Revenue Code (1939) as amended, 62 Stat. 991 (1948).

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**REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

1. The Court of Appeals for the Fourth Circuit has decided a federal question in a way in conflict with applicable decisions of this Court and in conflict with a decision of the Court of Appeals for the Second Circuit.

2. The Court of Appeals for the Fourth Circuit has decided a question important in the administration of federal tax law which should be reviewed by this Court.

## ARGUMENT.

### I. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND IN CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

This Court has recognized the well-established general principle that in the absence of an appeal by a party, the relief granted to that party may not be increased nor that of his adversary reduced.

*Le Tulle v. Scofield,* 308 U.S. 415 (1940);
*Morley Construction Co. v. Maryland Casualty Co.,* 300 U.S. 185 (1937).

Even a successful party must appeal from a judgment the effect of which it may subsequently desire to avoid.

*Partmar Corporation v. Paramount Theatres Corp.,* 347 U.S. 89 (1954).

These principles have been specifically applied to appeals from the Tax Court (Board of Tax Appeals) in cases involving the internal revenue laws.

*Le Tulle v. Scofield,* 308 U.S. 415 (1940);
*Helvering v. Pfeiffer,* 302 U.S. 247 (1937).

In *Helvering v. Pfeiffer, supra,* two dividend issues arose with respect to a single taxable year. A stock dividend of preferred on common was received by taxpayer in 1931. A similar stock dividend had been received in 1928, and such stock was redeemed in 1931. The taxpayer had treated both the 1928 and the 1931 stock dividends as nontaxable and had reported the profit on redemption of the 1928 stock dividend in 1931 as capital gain. The Commissioner held the 1931 stock dividend taxable, and

also treated the redemption of the 1928 stock as equivalent to a dividend in 1931 under section 115 (g) of the Revenue Act of 1928. The then Board of Tax Appeals held (a) that both stock dividends were taxable when received, i.e., in 1928 and 1931, (b) that the redemption in 1931 of the 1928 stock was not equivalent to a dividend, and (c) that no gain was realized in 1931 on the redemption of the 1928 stock because its basis was equal to its value when received (although it had not then been taxed). The Commissioner did not appeal the Board's decision on the latter two points, but the taxpayer appealed with respect to the taxability of the 1931 stock dividend. The Court of Appeals held the 1931 stock dividend nontaxable, but refused to consider the Commissioner's claim that, in that event, a gain should be taxed on the redemption of the 1928 stock, *even as a ground to sustain pro tanto the deficiency found by the Board.*

The Commissioner's petition for certiorari in the *Pfeiffer* case was granted in connection with that in *Helvering v. Gowran,* 302 U.S. 238 (1937). In accordance with the decision in the *Gowran* case, both stock dividends were deemed nontaxable when received, but the stock so received had a zero basis. Nevertheless, the Supreme Court rejected the Commissioner's contention in the *Pfeiffer* case that gain should be taxed on the redemption of the 1928 stock. Justice Brandeis, speaking for the majority of the Court, declared that the Court of Appeals had properly refused to consider that contention since, while a decision may be sustained on a new ground, it

may not be attacked by the appellee without a cross-appeal.[3]

While in the *Pfeiffer* case the decision in the Tax Court from which the Commissioner failed to appeal was unfavorable to the Commissioner, the Court of Appeals for the Second Circuit applied the rule of the *Pfeiffer* case to a situation in which the judgment from which the Commissioner failed to appeal was favorable.

*Rosenthal v. Commissioner*, 205 F.2d 505 (2d Cir. 1953).

In that case gift taxes for 1944 and 1946 had been determined by the Tax Court with respect to the interests of the taxpayer's wife and children under a separation agreement (1944) and an amendment thereof (1946). The Tax Court sustained the Commissioner with respect to the tax on the wife's interest given in 1944, and also with respect to the children's interests which were deemed to have arisen from the 1946 amendment. It rejected the taxpayer's contention (among others) that the children's

[3]Justices Stone and Cardozo, dissenting, declared that the deficiency determination drew in question every item which entered into the computation of the tax, and that so long as the Commissioner did *not* seek to *increase the deficiency* found by the Board, he might, without a cross-appeal, sustain such deficiency by raising a different item. That dissent, however, is not the law as laid down by the majority of the Supreme Court, and, in any event, even the dissent affords no comfort to the respondent. The respondent's position here would require the Tax Court to find a deficiency for 1941 *in addition to* that previously determined by it, and even the dissenting Justices in the *Pfeiffer* case did not suggest that; on the contrary, the dissenters held that without an appeal by the respondent, a greater deficiency could not be determined than that which had been adjudged by the Board of Tax Appeals in its first determination (irrespective of whether the original deficiency notice had been in a larger amount).

surrender of rights under the 1944 agreement was consideration for what they received in 1946, and therefore it did not have to consider the Commissioner's alternative plea for an increased deficiency for 1944 on account of the children's original receipt of such rights. See *Paul Rosenthal,* 17 T.C. 1047, 1063 (1951). The taxpayer appealed with respect to 1946. The Commissioner did not appeal at all. The Court of Appeals held that a completed gift to the children had been made in 1944, and that its surrender by them was consideration for the 1946 transfer, thereby reducing (if not eliminating) the taxable gift in 1946.

The Commissioner in the *Rosenthal* case asked the Court of Appeals to pass on his alternative claim for the tax for 1944, which he had originally raised before the Tax Court and which would be due in view of the appellate court's decision with respect to 1946. The Court of Appeals referred to the dissent in the *Pfeiffer* case as tending to support the Commissioner, but declared that the actual decision of the Supreme Court majority "seems rather directly the other way." It also declared that any argument that the two deficiencies constituted a single judgment, in which a party who did not appeal could nevertheless procure the offsetting of an increase in one deficiency against an overpayment found for another year, "seems precluded" by "the settled rule that each taxable year is to be treated as a separate unit for assessment and decisional purposes."

From the foregoing discussion it is clear that the decision of the Court of Appeals for the Fourth Circuit

in the instant case is in conflict with both *Helvering v. Pfeiffer,* 302 U.S. 247 (1937) and *Rosenthal v. Commissioner,* 205 F.2d 505 (2d Cir. 1953).

The stipulation of the parties in the instant case referred to in the opinions of the Tax Court and the Court of Appeals does not modify the application of the principle of law set forth in the *Pfeiffer* and *Rosenthal* cases even if the Tax Court's interpretation of the stipulation is accepted. A stipulation in a trial court is merely one of the items considered by the trial court prior to the entry of judgment; it has no effect once the judgment has been entered. Thus, in the instant case, it is clear that if petitioner had not appealed from the judgment assessing a deficiency for 1941 and had been successful in her appeal from the judgment assessing a deficiency for 1940, the Tax Court could not have increased the amount of the 1941 deficiency on remand. This would be true regardless of any stipulation of the parties. It is apparent, therefore, that the only possible ground by which the Tax Court could acquire jurisdiction to increase the 1941 deficiency against petitioner was her own appeal. The *Pfeiffer* case holds that in such circumstances there is no power to increase the deficiency against the taxpayer. In his brief filed in the Court of Appeals respondent did not even rely on the stipulation to sustain his position. It is important to note that in the *Pfeiffer* case, as well as in the instant case, the Tax Court in rendering its opinion ordered the decision to be entered under Rule 50 of the Tax Court.

*Annie M. Pfeiffer,* P-H 1936, T.C. Mem. Dec. Par. 36,224 (1936).

Thus, even without a stipulation of the parties to the effect that the computation of the tax might be made pursuant to Rule 50, the Tax Court can so order and thereafter render judgment pursuant to a computation made pursuant to Rule 50. Such an order could not in any event enlarge the jurisdiction of the Tax Court or an appellate court to modify that judgment.

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**II. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED A QUESTION IMPORTANT IN THE ADMINISTRATION OF FEDERAL TAX LAW WHICH SHOULD BE REVIEWED BY THIS COURT.**

Petitioner asserts that *Helvering v. Pfeiffer,* 302 U.S. 247 (1937), *supra,* has determined the question involved in the instant case contrary to the decisions of the Tax Court and the Court of Appeals for the Fourth Circuit. No decision of this Court bearing more directly on the question presented has been found; no cases were cited in the opinions of the lower courts in support of their decisions which refused to follow the *Pfeiffer* case. The Court of Appeals for the Second Circuit has expressly followed the *Pfeiffer* case, but the Court of Appeals for the Fourth Circuit has refused to do so. Petitioner respectfully submits that proper and uniform administration of the revenue laws requires that this Court now settle this question.

For obvious practical reasons it is necessary that an appellant, whether a taxpayer or the Commissioner, be able to foresee the possible consequences of an appeal

from a decision of the Tax Court. If the taxpayer alone appeals, does he run the risk that the amount of the judgment against him can be increased? If the Commissioner alone appeals, can the amount of the deficiency be decreased?[4] Cases frequently arise involving gifts (*Rosenthal v. Commissioner*, 205 F.2d 505 (2d Cir. 1953)), dividends (*Helvering v. Pfeiffer*, 302 U.S. 247 (1937)), and tax credits (*Marsman v. Commissioner*, 205 F.2d 335 (4th Cir. 1953)), where the determination of tax liability for one year affects the tax liability for another year. In many of these cases the tax liabilities for the years in question are litigated together. Thus the Tax Court may hold that the tax impact of a particular transaction occurs in the first year and not in the second. In case of an appeal by the taxpayer from the judgment against him for the first year, must the Commissioner also appeal from the judgment for the second year in order that taxes will not be lost in case of reversal of the judgment against the taxpayer for the first year? Or if the Commissioner appeals from the judgment against him for the second year, must the taxpayer also appeal from the judgment for the first year in order that he may not be taxed twice on the same transaction in case of reversal?

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[4]This situation would have occurred in the instant case if the Commissioner alone had successfully appealed from the holding of the Tax Court that petitioner was not a resident of the United States until September 22, 1940. If the Court of Appeals had held her a resident from January 1, 1940, petitioner would have been entitled to an *increased* tax credit against her 1941 United States taxes for Philippine taxes paid on her Philippine income for the entire year 1940.

It is respectfully submitted that there is here presented a proper action for the exercise of the supervisory power of this Court.

Dated, San Francisco, California,
December 27, 1954.

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SEYMOUR S. MINTZ,
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RICHARD J. ARCHER,
WILLIAM T. PLUMB, JR.

**(Appendix Follows.)**

## Appendix to Petition for Writ of Certiorari

[Title of Tax Court and Cause.]

**MEMORANDUM SUR DECISION OF THE TAX COURT.**

This proceeding, as instituted, put in issue the correctness of the respondent's determination of deficiencies in income tax against the petitioner for the years 1939, 1940 and 1941. For each of the years, petitioner was a citizen of the Commonwealth of the Philippines, and from September 22, 1940, through 1941 and after, she was a resident alien of the United States. As one of the issues, she claimed that her income for 1940 was in a lesser amount than that determined and contended for by the respondent. Also in dispute was the amount of the credit against her 1941 Federal income tax to which she was entitled for 1940 Philippine income tax paid in 1941. Due to limitations prescribed by section 131 of the Internal Revenue Code, the amount of the credit so allowable against her 1941 Federal income tax was the amount resulting from the application of ratios to be determined by relating her 1940 income from sources within and without the United States to her 1940 income from all sources. It is thus apparent that the amount of her credit against her 1941 income tax for 1940 Philippine income tax was necessarily an open question and in issue until determination of her 1940 income. Aside from such resulting adjustment of credit, which had to await determination of her 1940 income, the petitioner claimed credit for the full amount of the 1940 Philippine income tax, without regard to the fact that a substantial part of such tax was on income received by her during that part of 1940 when she

was not a resident of the United States and as to which, in so far as this Court was concerned, there was no double tax. In submitting this proceeding to this Court for decision, the parties stipulated that as to the foreign tax credit for 1941, computation of the tax would be made under Rule 50, in accordance with the Court's decision thereon.

The decision in this Court was for the respondent on both of the issues set forth above, and as to both of them, petitioner appealed. She was successful in her appeal on the 1940 income issue, but unsuccessful for 1941 on her claim for credit of the 1940 Philippine income tax which was attributable to income received in 1940 before she became a resident of the United States. She now claims that, since she lost her appeal as to the 1941 foreign tax credit and the respondent did not make a contingent or saving cross-appeal, the proceeding is now closed as to 1941 and the respondent has lost any right he may have had to an increased deficiency for 1941 through application of the reduced credit resulting from final determination that her 1940 income was less than that which had been found by this Court and in respect of which it has been reversed.

It is our opinion that the position of the petitioner is not well taken. The adjustment of the 1941 foreign tax credit resulting from the final determination of her 1940 income admittedly is only a matter of mathematical computation, and was obviously inherent in the issues raised and decided, both in this Court and on appeal, and in our opinion the only reasonable reading and application of the stipulation of the parties, under which the proceed-

ing was submitted, is that it contemplated and covered such a situation as we now have. Any other interpretation, we think, would make the stipulation empty and meaningless.

Such being our view of the matter, we do not reach the cases cited and relied upon by the parties herein.

[Title of Tax Court and Cause.]

DECISION OF THE TAX COURT.

Pursuant to its Findings of Fact and Opinion promulgated April 3, 1952, this Court on June 13, 1952, entered its decision herein finding deficiencies in income tax for the year 1939, the taxable period September 22, 1940 to December 31, 1940, and the year 1941, in the respective amounts of $133.25, $58.855,63 and $61,780.35. On September 12, 1952, a petition for review of the decision as to the determination of deficiencies for the taxable period September 22, 1940 to December 31, 1940, and the year 1941 by the United States Court of Appeals for the Fourth Circuit was filed by petitioner. Assessment and collection of the deficiencies which had been determined was not stayed by the filing of a bond, pending appeal, but the full amounts thereof were paid by the petitioner on January 2, 1953.

Upon review, the decision of this Court was reversed in part, and pursuant to leave granted by order dated September 3, 1953, the respondent on November 16, 1953, filed his computation of the tax under the opinion and mandate of the Court of Appeals. As to the taxable period September 22, 1940 to December 31, 1940, and with which petitioner is in agreement, the computation discloses that the correct deficiency in income tax decided and determined by this Court was overstated in the amount of $46,652.13, which amount, having been paid pending appeal and in lieu of bond, is within the provisions of section 1146 of the Internal Revenue Code.

For the year 1941, the computation of the tax filed by the respondent is opposed by petitioner. As to that year,

and for reasons set forth in the Memorandum attached hereto and made a part hereof, it is the conclusion of this Court that the position of the petitioner and her objections to the respondent's computation are not well taken.

It is accordingly,

Ordered and Decided: That for the taxable period September 22, 1940 to December 31, 1940, there is a deficiency in income tax of $12,203.50, which amount was paid pending the appeal before the United States Court of Appeals for the Fourth Circuit; and that for the year 1941 there is a deficiency in income tax of $82,248.82, of which amount $61,780.35 was paid pending appeal before the said Circuit Court of Appeals.

Enter: Entered Feb 25 1954

(Signed) BOLON B. TURNER
Judge

**OPINION OF THE COURT OF APPEALS.**

United States Court of Appeals
for the Fourth Circuit

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No. 6819

---

MARY A. MARSMAN,
Petitioner,

*versus*

COMMISSIONER of INTERNAL REVENUE,
Respondent.

---

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

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(Argued October 7, 1954. Decided October 8, 1954.)

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Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

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Seymour S. Mintz (Herbert W. Clark, Nelson T. Hartson, William T. Plumb, Jr., Leon F. DeFremery, Clarence E. Musto, Richard J. Archer, Morrison, Hohfeld, Foerster, Shuman & Clark, and Hogan & Hartson on brief) for Petitioner, and Louise Foster, Special Assistant to the Attorney General (H. Brian Holland, Assistant Attorney General, Ellis N. Slack and Lee A. Jackson, Special Assistants to the Attorey General, on brief) for Respondent.

PER CURIAM:

We had occasion to consider the facts of this case on the appeal of the taxpayer in *Marsman v. C.I.R.*, 4 Cir., 205 F. 2d 335. We there held that Mary A. Marsman, a citizen of the Commonwealth of the Philippines, was a resident of the United States during the period from September 22, 1940 to December 31, 1941; and that she was liable for the United States income tax for the year 1940 on so much of one-half of the undistributed net income held on December 31, 1940 by LaTrafagona, a Philippine corporation wholly owned by her, as was acquired after September 22, 1940. By this holding we affirmed the Tax Court on the question of residence but reversed its holding that the taxpayer was taxable on the entire amount of the undistributed income held by LaTrafagona on December 31, 1940.

We also held, as to the year 1941, that the taxpayer was entitled to a credit on the United States income tax for that year for a part of the income tax paid by her to the Philippine Islands in 1941 for the years 1938 and 1940. In this respect we rejected the contention of the taxpayer that she was entitled to a credit for the full amount of the Philippine income tax paid by her in 1941, and upheld the finding of the Tax Court that she was entitled to a credit for only so much of the Philippine income tax as was allocable to the period from September 22 to December 31, 1940.

After making these holdings we remanded the case to the Tax Court for further proceedings in accordance with our opinion. The Tax Court carried out the mandate of this court by reducing the amount of the tax assessed

against the taxpayer for the year 1940 from $58,855.63 to $12,203.50, and by increasing the deficiency determined against the taxpayer for the year 1941 from $61,780.35 to $82,248.32. Both the decrease in the deficiency for 1940 and the increase in the deficiency for 1941 were due to the holding that the determination of the tax and of the tax credit should be restricted to the period from September 22 to December 31, 1940.

The present appeal is taken by the taxpayer from the determination by the Tax Court of a greater deficiency for the year 1941. In other words, the taxpayer seeks to secure the benefit but to avoid the disadvantage of the decision of this court. Admitting that such a result would be inequitable, the taxpayer bases the argument on the fact that the Commissioner did not take a conditional appeal from the first decision of the Tax Court as to the taxable year 1941. It is contended that he should have appealed if he desired to protect himself from the possible holding on appeal that the taxpayer was taxable on her Philippine income for only a part of the year which in turn would require the reduction of the taxpayer's credit for the year 1941. Since the Commissioner failed to take such an appeal it is contended that the Tax Court had no jurisdiction to increase the deficiency for the year 1941.

We do not agree. The parties entered into a stipulation during the first trial before the Tax Court that there were two issues for the year 1941 on which the parties disagreed, namely, community property, and foreign tax credit or deduction, and that computation of the tax would be made under Rule 50, in accordance with the court's decision on these issues. This stipulation can only be interpreted as

relating not only to a computation of the tax due after the first decision in the Tax Court but after such subsequent decision as might be necessary by the modification of the Tax Court's decision in case of an appeal. Furthermore the Commissioner had no occasion to appeal from the decision of the Tax Court as to the year 1941 because the decision was in his favor. The decision as to both taxable years turned on the same point as to the period for which the taxpayer was taxable on the Philippine income, which in turn controlled the period for which the tax credit was to be allowed. The appeal of the taxpayer opened up the controversy as to both taxable years and conferred jurisdiction on this court to render its former decision on appeal and also jurisdiction upon the Tax Court to carry out the mandate of this court. We find nothing in *Helvering v. Pfeiffer*, 302 U.S. 247, or *LeTulle v. Scofield*, 308 U.S. 415, at variance with these conclusions.

The decision of the Tax Court will be

*Affirmed.*

JUDGMENT OF THE COURT OF APPEALS.

United States Court of Appeals
for the Fourth Circuit

No. 6819

Mary A. Marsman,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

On Petition to Review the Decision of The Tax Court of the United States.

This cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

October 8, 1954.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

Filed, Oct. 8, 1954
R. M. F. Williams, Jr.
Clerk

A true copy,
Teste:
(Seal) RICHARD M. F. WILLIAMS, JR.,
Clerk of the United States Court
of Appeals for the Fourth Circuit

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# In the Supreme Court of the United States

OCTOBER TERM, 1954

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No. 509

MARY A. MARSMAN, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

On the original hearing of this case, the Tax Court rendered a memorandum opinion which is unreported and also an opinion reported at 18 T.C. 1. The opinion of the Court of Appeals on the first appeal is reported at 205 F. 2d 335.

Upon the remand, the Tax Court rendered a memorandum *sur* decision (R. 78-80) which is unreported.[1] The opinion of the Court of Appeals upon the second appeal is reported at 216 F. 2d 77.

[1] Record citations are to the appendix to the petitioner's brief filed upon the second appeal to the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals on the second appeal was entered on October 8, 1954 (Pet. 2). The petition for a writ of certiorari was filed on January 3, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

On taxpayer's first petition for a review of a Tax Court decision on the taxable years 1940 and 1941, the Court of Appeals' decision for 1940 was in taxpayer's favor and effected a reduction in the amount of taxable income for the year 1940. Similarly, it effected a reduction in the amount of a credit for the year 1941, the credit being based on the amount of the tax paid on 1940 taxable income. The proper method of computing this credit had been one of the issues decided adversely to taxpayer by the Court of Appeals.

The Tax Court, on remand, in carrying out the mandate of the Court of Appeals, reduced the amount of the deficiency originally redetermined by it for 1940 and correspondingly increased the deficiency which it had redetermined for 1941.

The question presented is whether the Court of Appeals erred in holding that the Tax Court had authority on the remand to increase the 1941 deficiency, even though the Commissioner had not petitioned for review of the first Tax Court decision for 1941, which was in his favor.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 1141. COURTS OF REVIEW.

(a) [As amended by Sec. 36, Act of June 25, 1948, c. 646, 62 Stat. 869, and by Sec. 128, Act of May 24, 1949, c. 139, 63 Stat. 89] *Jurisdiction.*—The courts of appeals shall have exclusive jurisdiction to review the decision of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.

* * * * *

(26 U.S.C. 1952 ed. Sec. 1141.)

STATEMENT

The three issues, which were all decided adversely to the taxpayer and which were made the basis of her first appeal to the Court of Appeals, are, in substance, as follows:

1. Whether the taxpayer, a citizen of the Commonwealth of the Philippines, was a resident of the United States during the period from September 22, 1940, to December 31, 1941;

2. If so, whether she is liable under Sections 331 to 337, inclusive, of the Internal Revenue Code of 1939 on one-half [2] of the undistributed net income held on December 31, 1940, by La Trafagona, a Philippine corporation wholly owned by her; and

3. Whether the taxpayer, being on a cash basis, is entitled to a credit against her United States income tax for 1941 in the amount of the income taxes paid by her to the Philippine Government in 1941 for the years 1938 and 1940.

The Court of Appeals (205 F. 2d 335) decided (1) that the taxpayer became a resident of the United States on September 22, 1940; (2) that only that portion of the income of La Trafagona which was received by that corporation during the period from September 22, to December 31, 1940, or 101/366ths of such income, is subject to the United States income tax; and (3) that the taxpayer is entitled to no credit against her 1941 United States income tax for the 1938 income tax paid to the Philippine Government, and that the credit for the 1940 tax paid to that government should be limited to the portion of such tax which is allocable to income earned during the period between September 22 and December 31, 1940. Thus the Court of Appeals, having held that the first and third issues should be affirmed and the

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[2] Only one-half, rather than the entire amount, was in question because the Commissioner conceded that such income was derived from community property. It was also agreed by the parties that the undistributed net income of El Emprendedor, the corporation belonging to taxpayer's husband, should be treated the same as that of La Trafagona.

second issue reversed, remanded the case for further proceedings in accordance with its opinion. (R. 68-69.)

Upon the remand, the Tax Court determined that the deficiency for the period September 22, 1940, to December 31, 1940, should be $12,203.50 instead of $58,855.63 as previously found, and that the deficiency for 1941 should be $82,248.82 instead of $61,780.35 as previously found (R. 63, 77-78).[3]

Upon the second appeal by the taxpayer, the Court of Appeals affirmed the Tax Court's decision, thus approving the increased deficiency for 1941.

## ARGUMENT

Taxpayer objects to the increased deficiency which was determined for 1941 upon the remand of

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[3] The changes in the deficiencies for both years were due to a reduction in taxpayer's taxable income for the period from September 22, 1940, to December 31, 1940; and the only portion of that income in dispute was her Supplement P net income, *i.e.*, income from the two Philippine corporations owned by taxpayer and her husband. Under the Tax Court's original decision, taxpayer's share of such income was computed to be $104,236.37. (R. 74.) But the Court of Appeals held that only 101/366ths of that amount (*i.e.*, $28,764.68) could be treated as Supplement P net income. Not only did that require a reduction in such income to the extent of $75,471.69 but the total adjusted gross income for the 1940 period had to be reduced to the same extent. As the adjusted gross income was originally determined as $125,316.57 (original record, p. 99) such income after the reduction is $49,844.88 (R. 76). The latter figure is thus the amount not only to be used in computing the United States tax for 1940, but is also the figure to be used in determining the amount of the 1940 Philippine tax credit. Obviously the use of this smaller figure resulted not only in a smaller tax for 1940 but also in a smaller credit to take against the 1941 tax and that in turn required an increased deficiency for 1941.

this case to the Tax Court, after the first appeal. She does not, however, deny that such deficiency as finally determined was correctly computed or that the computation was in accordance with the first opinion and mandate of the Court of Appeals. Her contention is that, since the Commissioner took no appeal from the Tax Court's original decision, that court was subsequently without authority to increase the deficiency and that the decision of the Court of Appeals on the second appeal, upholding such deficiency, is in conflict with certain cases defining the scope of appeals. We submit that there is no conflict here and that the courts below have not exceeded their authority.

1. In view of the ruling of the Court of Appeals on the taxpayer's first petition for review decreasing taxpayer's 1940 income subject to tax, it was also necessary for the Tax Court, in applying the appellate court's mandate, to decrease the amount of the tax credit which taxpayer claimed as a deduction from her 1941 tax since the size of that credit was dependent on the amount of taxpayer's 1940 taxable income. As the Tax Court stated (R. 80), the adjustment of this tax credit was only a matter of mathematical computation and was obviously inherent in the issues which had been already decided by both courts. The Court of Appeals, upon the second appeal, also took the same view and pointed out that since the issues presented on the first appeal had been decided by the Tax Court in the Commissioner's favor, he had no occasion to take an appeal. Therefore the court held

that there was no merit in taxpayer's contention that an appeal by the Commissioner was a prerequisite to securing an increased deficiency.

Since the taxpayer's original petition for review related to the Tax Court's decisions for both the years 1940 and 1941, its decision did not become final as to either year. Section 1140, Internal Revenue Code of 1939. When the case was remanded by the Court of Appeals, the Tax Court had all the authority with respect to both years which it originally possessed when the taxpayer sought redetermination of the Commissioner's deficiency determination, except that the Tax Court was now bound to follow the mandate of the appellate court and to apply the law of the case. *Swenson* v. *Commissioner,* 69 F. 2d 280 (C.A. 5th); *Houston* v. *Commissioner,* 53 F. 2d 445 (C.A. 3d); cf. *Burton-Sutton Oil Co.* v. *Commissioner,* 161 F. 2d 558 (C.A. 5th), reversed, 328 U. S. 25.

If the Tax Court, in the first instance, had computed the taxpayer's 1940 income in the manner which was ultimately held to be proper by the Court of Appeals, there could have been no question of the authority of the Tax Court to use that as the basis for computing the amount of the 1941 tax credit which was dependent on the amount of 1940 income. There is no merit in the contention that the Tax Court possessed any less authority on the remand of the case, since no final decision had been entered for either taxable year. On the contrary, since the method of computing the 1941 credit had been raised as an issue by the taxpayer

and decided by the Court of Appeals in the Commissioner's favor, the Tax Court would have violated the mandate of the Court of Appeals had it entered any different decision.

The taxpayer's contention that the Commissioner should have sought review in the first instance to keep the issue open, is devoid of merit. In the first place, since, as we have stated, the decision of the Tax Court was favorable to the Commissioner, there would have been no reason for the Commissioner to seek review. Only an aggrieved party has standing to appeal. *Electrical Corp.* v. *Thomas Co.*, 307 U.S. 241, 242; *Pub. Serv. Commission* v. *Brashear Lines*, 306 U.S. 204, 206-207; *Lindheimer* v. *Illinois Tel. Co.*, 292 U.S. 151, 176.[4] Furthermore, where an issue decided in a taxpayer's favor, in the first instance or on appeal, necessarily involves a related matter which affects the ultimate tax liability, the Tax Court has full authority to make the final tax computation by giving effect to both matters. *Insular Sugar Refining Co.* v. *Commissioner*, 157 F. 2d 673 (C.A. 2d); *Olds & Whipple* v. *United States*, 22 F. Supp. 809 (C. Cls.); *Burton-Sutton Oil Co.* v. *Commissioner*, 161 F. 2d

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[4] Since the material findings of the Tax Court relative to these issues were all adverse to the taxpayer, the instant case is also distinguishable from *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89 (Pet. 10), in which it was held that a corporation, which had received a favorable decision in a suit brought against it but had failed to appeal from one adverse finding entered therein, could not object to such finding or have it set aside on an appeal from a decision in another closely related suit in which it was material.

558 (C.A. 5th), reversed, 328 U.S. 25; *F. A. Gillespie & Sons Co.* v. *Commissioner,* 154 F. 2d 913 (C.A. 10th), certiorari denied, 329 U. S. 781. And, as the *Insular Sugar Refining* and *Olds & Whipple* cases demonstrate, the final computation is proper even if it results in an increased deficiency for one of the years over that originally determined by the Commissioner. [5]

2. There is no conflict in decisions. *Helvering* v. *Pfeiffer,* 302 U. S. 247 (Pet. 10-17), involved the question whether an appellate court should consider grounds for sustaining the Commissioner's determination which were not presented to the Board of Tax Appeals (now the Tax Court) on an issue decided adversely to the Commissioner by that tribunal. The *Pfeiffer* case, aside from the fact that it does not announce an inflexible rule (see *Helvering* v. *Gowran,* 302 U.S. 238; *Hormel* v. *Helvering,* 312 U.S. 552; *Helvering* v. *Richter,* 312 U. S. 561), has nothing to do with the authority of the Tax Court to comply with the mandate of

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[5] It will be observed that the deficiency determined by the Tax Court in this case for 1941, while representing an increase over that determined in its original decision, does not represent an increase over the deficiency determined by the Commissioner. Thus, the *Insular Sugar Refining* and *Olds & Whipple* cases make this an *a fortiori* situation.

Because the deficiency for 1941 redetermined by the Tax Court is not greater than that determined by the Commissioner, no issue exists concerning the application of Section 272 (e) of the Internal Revenue Code of 1939 which controls the authority of the Tax Court with respect to the redetermination of deficiencies in excess of those determined by the Commissioner.

the Court of Appeals with respect to issues litigated by one of the parties in the reviewing court.

And *Rosenthal* v. *Commissioner,* 205 F. 2d 505 (C.A. 2d) (Pet. 12-14, 16), is plainly not in conflict with the decision below. That case involved asserted gift tax deficiencies for 1944 and 1946, and the Commissioner asked, in the alternative, if the gift were held not to be taxable in 1946 it should be taxed in 1944. The Tax Court held the gift taxable in 1946 and, consequently, did not tax it in 1944. The taxpayer filed a petition for review for 1946 but the Commissioner did not seek review of the decision for 1944. The Court of Appeals reversed the decision for 1946, ruling that the gift was made in 1944. Although the Court of Appeals expressed no definitive views on the matter, its opinion indicates that it thought that the Commissioner could no longer succeed in imposing the tax for 1944, because the Tax Court's decision for that year had become final, no petition for review having been filed for that year by either party.

It is readily apparent that the *Rosenthal* case is distinguishable from the present case in its most significant aspect for here, unlike the situation in *Rosenthal,* all the taxable years were in issue in the Court of Appeals so that the Tax Court's decision had not become final as to any year. See Section 1140, Internal Revenue Code of 1939. Consequently, both the Court of Appeals and the Tax Court, on the remand, continued to possess jurisdiction to redetermine the correct tax liability for each year. As the taxpayer does not contend that the

decision here is erroneous in any substantive respect, it is plain that the Tax Court and the Court of Appeals have made the correct computation.

### CONCLUSION

The decision below is correct. There is no conflict of decisions and further review is not warranted. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
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H. BRIAN HOLLAND,
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*Special Assistants to the Attorney General.*

JANUARY, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 329873 929

FILED
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HAROLD B. WILLEY,

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1954

## No. 509

MARY A. MARSMAN,
*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.**

## REPLY BRIEF FOR PETITIONER.

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# In the Supreme Court
OF THE
# United States

October Term, 1954

No. 509

Mary A. Marsman,
*Petitioner,*
vs.
Commissioner of Internal Revenue,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.**

## REPLY BRIEF FOR PETITIONER.

The material contained in the Commissioner's brief in opposition has been covered by petitioner's opening brief. However petitioner wishes to correct herein certain misconceptions which the Commissioner's brief may have created.

### 1. THE MANDATE OF THE COURT OF APPEALS IS IN CONFLICT WITH THE PFEIFFER CASE.

In his first argument (page 7) the Commissioner correctly states that when this case was remanded by the Court of Appeals the Tax Court's authority was limited so that it was then bound to follow the mandate of the Appellate Court and to apply the law of the case. The Commissioner uses this concept in an attempt to distinguish *Helvering v. Pfeiffer,* 302 U.S. 247 (1937), by stating (page 9) that *Pfeiffer* has nothing to do with the authority of the Tax Court to comply with the mandate of the Court of Appeals with respect to issues litigated by one of the parties in the reviewing court. Petitioner asserts that the Court of Appeals should have taken cognizance of the *Pfeiffer* case, either (a) by specifying in its original mandate the rule established by *Pfeiffer* that the deficiency for 1941 could not be increased absent an appeal by the Commissioner from the Tax Court's decision, or (b) by correcting on the second appeal its prior mandate so as to incorporate the rule of *Pfeiffer.* We maintain, therefore, that the conflict lies not in what the Tax Court did but in what the Court of Appeals failed to do.

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### 2. AN APPEAL BY THE COMMISSIONER WAS A PREREQUISITE TO SECURING AN INCREASED DEFICIENCY.

The first full paragraph on page 8 of the Commissioner's brief commences with the statement: "The taxpayer's contention that the Commissioner should have sought review in the first instance to keep the issue

open, is devoid of merit." The Commissioner bases this conclusion upon a finding of the Court of Appeals (page 6) that, the decision of the Tax Court being favorable to the Commissioner, he had no occasion to take an appeal; and in addition the Commissioner asserts (page 8) that since he was not an aggrieved party he had no standing to appeal (citing cases). However, none of these cases involved the right or duty of a successful litigant to take a conditional cross-appeal where his adversary has appealed to protect his rights in the event of adverse action in the appellate court. Furthermore, it is a well-established rule that a party may appeal from a judgment or decree in his favor if it fails to award him all the relief sued for or to which he is entitled. See *United States v. Dashiel,* 70 U.S. 688 (1866), and more recently, *Automobile Ins. Co. of Hartford, Conn. v. Barnes-Manley Wet Wash Laundry Co.,* 168 F.2d 381 (10th Cir. 1948); cert. denied, 335 U.S. 859. In the instant case the statutory notice issued by the Commissioner originally asserted a deficiency of $152,224.16 for the year 1941 (R. 11, 13). The decision of the Tax Court reduced this deficiency to $61,780.35 (R. 62, 63). It is apparent, therefore, that the Tax Court's decision awarded the Commissioner substantially less than the amount which he originally asserted was due him. Although this decision was sufficiently favorable to the Commissioner to cause the taxpayer to appeal, at least one of the issues was obviously decided against the Commissioner or the original deficiency would have been sustained. Under these circumstances it is clear that the Commissioner was an "aggrieved party" with legitimate

grounds upon which to base an appeal if he was dissatisfied with the Tax Court's decision.

In a footnote on page 8 the Commissioner ostensibly distinguishes the instant case from *Partmar Corp. v. Paramount Corp.*, 347 U.S. 89 (1954), on the ground that all the issues herein were adverse to the taxpayer (from which he tacitly infers that they were all in favor of the Commissioner) whereas in *Partmar* an issue had been decided against a corporation which thereupon failed to appeal from this decision. As we have shown immediately above, the Tax Court decided at least one issue for the year 1941 adversely to the Commissioner and therefore the facts in the instant case are not as the Commissioner has tacitly assumed them to be. On the contrary, the pertinent facts herein cannot be distinguished from those in the *Partmar* case and therefore the Commissioner's effort to distinguish that case is without merit.

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### 3. THE TAXPAYER'S APPEAL FOR THE YEAR 1941 DID NOT HOLD THAT YEAR OPEN FOR ALL PURPOSES.

On page 10 of his brief the Commissioner attempts to distinguish *Rosenthal v. Commissioner*, 205 F.2d 505 (2d Cir. 1953), on the ground that in the instant case all the taxable years were at issue in the Court of Appeals which was not the fact in *Rosenthal*. The answer to this contention lies in the *Pfeiffer* case. In *Pfeiffer* two transactions *in a single year* were involved and, in the sense used in section 1140 of the Internal Revenue Code of

1939, that year had not been finally closed because of the taxpayer's appeal. Nevertheless, in the absence of an appeal by the Commissioner, this Court declined to permit an issue concerning another transaction to be raised by him as an offset to the issue decided for the taxpayer, even though both turned on the same question of law.

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**4. FAILURE OF THE COMMISSIONER'S BRIEF TO RELY ON THE REASONING USED BY THE TAX COURT AND THE COURT OF APPEALS THAT THE STIPULATION IN CONJUNCTION WITH RULE 50 AUTHORIZED THE INCREASED DEFICIENCY.**

It is significant that the Commissioner has failed to answer the argument set forth in petitioner's opening brief (pages 14 and 15) that the stipulation, relied upon by the lower courts to sustain their decisions, could not enlarge the jurisdiction of the Tax Court under Rule 50. In the *Pfeiffer* case the decision of the Board of Tax Appeals (now Tax Court) was rendered against the taxpayer with computation to be entered under Rule 50. The Court of Appeals reversed this decision and this Court sustained the Court of Appeals. It is apparent, therefore, that the effect of this Court's decision in the *Pfeiffer* case was to define the Board's jurisdiction under Rule 50. If the deficiency in the instant case is increased under Rule 50, it is clear that there is a direct conflict with this Court's decision in *Pfeiffer*. We submit that the Commissioner's failure to answer this argument is not an oversight but is a tacit admission that there is no answer.

**It is respectfully submitted that a writ of certiorari should issue as prayed for in the petition filed herein.**

**Dated, San Francisco, California,**
**February 9, 1955.**

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